

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2023/00025

In the matter between:

HIMEEZEMBI RAHUNGIRUA KAMBURONA

APPLICANT

and

**MINISTER OF HOME AFFAIRS, IMMIGRATION, SAFETY
AND SECURITY**

1st RESPONDENT

**INSPECTOR-GENERAL OF THE NAMIBIAN POLICE
FORCE**

2nd RESPONDENT

DAVID SALUFU

3rd RESPONDENT

PROSECUTOR-GENERAL

4th RESPONDENT

Neutral citation: *Kamburona v Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-MOT-GEN-2023/00025) [2024] NAHCMD 103 (12 March 2024)

Coram: ANGULA DJP

Heard: 5 December 2023

Delivered: 12 March 2024

Flynote: Civil proceedings – Applications – Motions – Criminal Procedure Act 51 of 1977 (CPA) – Sections 6(a), 20 and 31 of the CPA – Whether a withdrawal of a case by the prosecution against the accused, in terms of s 6(a) has the same effect as when a case is struck from the roll by the court – What is the legal consequence in respect of a article that had been seized by the police in terms of s 20 of the CPA and was still under the police's custody subsequent to the case being struck from the roll by the presiding officer?

Summary: The application stemmed from a criminal matter that was instituted by the State against the applicant's brother and two other persons on counts of contravening the Controlled Wildlife Products and Trade Act 9 of 2008, as amended. The applicant's vehicle that was used by his brother to transport two pangolins, was seized by the police in terms of s 20 of the CPA and kept under police's custody. On 25 November 2023, the matter was struck from the roll by the magistrate due to the long delay by the police in finalising the investigations. Thereafter, the first accused person was re-summoned and appeared in court on 19 December 2023 and the matter was postponed to 29 March 2022. The applicant's brother was served with the summons on 9 February 2023, for appearance on 29 March 2023 to be joined to the re-instituted proceedings as an accused person.

The applicant instituted the present application seeking an order for the release of his vehicle which remained under police custody after the matter was struck from the roll by the magistrate, contending that he was entitled to the release of his vehicle as there was no longer a case pending against his brother. The court had to determine whether the striking of the matter had the same consequence as a withdrawal of case in terms of s 6(a) of the CPA. Furthermore whether the striking of the case from the roll entitled the applicant to the release of his vehicle form the police's custody.

Held that: both the striking and the withdrawal have the same consequence. Once a matter has been withdrawn or struck from the roll the effect thereof is that there is no longer a case pending before court.

Held that: s 20 and s 31 of the CPA are to be read together and that both sections were aimed at facilitating the investigation and proof of some offence to which the seized article was connected and that the State has to act with reasonable expedition in instituting criminal proceedings.

Held further that: the fact that there was no pending case when the present application was instituted did not detract from the power of the police to keep the vehicle under custody, in accordance with the provisions of Chapter 2 of the CPA, given the fact that criminal proceedings to which the article was connect have been re-instituted..

Accordingly the application was dismissed with costs.

Order

1. The application is dismissed with costs.
2. The matter is finalised and removed from the roll.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an application in which the applicant seeks an order against the first to third respondents to return his vehicle which was seized and kept in custody by the investigating officer, third respondent, after the driver of his vehicle who happened to be his brother, was charged with contravening the provisions of the Controlled Wildlife Products and Trade Act 9 of 2008 for being in possession of pangolins.

[2] The application concerns the power of the State to keep the seized article in custody if it appears that such article is not required at the trial for the purpose of evidence or a court order and the power of the police to dispose such article in terms of s 31 of the Criminal Procedure Act 51 of 1977, as amended ('the CPA') after the case has been withdrawn by the prosecution or struck from the roll by a presiding officer.

Parties

[3] The applicant is Himeezembi Rahungirua Kamburona, an adult male person.

[4] The first respondent is the Minister of Home Affairs, Immigration, Safety and Security appointed in terms of Article 32(3)(i) of the Namibian Constitution.

[5] The second respondent is the Inspector General of the Namibian Police Force, appointed in terms of Article 32(4)(c) of the Namibia Constitution read with s 1 of the Police Act 19 of 1990 ('the Police Act').

[6] The third respondent is Constable David Salufu, an adult male police officer and a member of the Namibian Police Force, appointed in terms of s 4 of the Police Act. He was the investigating officer in the criminal matter in which the applicant's vehicle was seized.

[7] The fourth respondent is the Prosecutor-General of Namibia, appointed as such in terms of Article 88 of the Namibian Constitution.

[8] The respondents' service address for the purpose of the present proceedings is the Office of the Government Attorneys situated on the 2nd floor of the Sanlam Building, Independence Avenue, Windhoek.

[9] In this judgment, the applicant will be referred to as such. The first respondent will be referred to as 'the Minister', the second respondent will be referred to as 'the Inspector General' and the fourth respondent as 'the PG'. The third respondent will be referred to as Constable Salufu.. Where reference is made to 'the respondents', it will mean all the respondents, collectively.

[10] Mr Kaurivi appeared on behalf of the applicant, whereas Mr Ludwig appeared on behalf of the respondents. Counsel filed helpful heads of argument for which the court wishes to thank them.

Factual background

[11] The following facts are common cause. The applicant is the owner of a 2013 Toyota Hilux 3.0 D4D extended cab motor vehicle ('the vehicle'), with the registration number of GELOOF NA. On 29 October 2021, his brother, Mr Tjavanga Kamburona, (Mr. Kamburona) drove the vehicle without the applicant's knowledge or consent and travelled from Otjongamburiro to Harnas near Epukiro. He was at the time carrying two pangolins in the vehicle. He was arrested by the police at the said farm whilst allegedly selling the pangolins to a purported buyer. The sale transaction turned out to be a police's trap.

[12] He was charged by Constable Salufu, alongside with two other persons, on counts of contravening the provisions of the Controlled Wildlife Products and Trade Act 9 of 2008 as amended. Upon Mr Kamburona's arrest, the vehicle was seized by the police with the aim of ultimately being presented as an exhibit in court. When the present application was brought and heard the vehicle was still under the police's custody.

[13] On 1 November 2021, Mr Kamburona and his co-accused made their first appearance at the Otjinene Magistrates Court. At the hearing, held on 25 November 2022, the magistrate struck the matter from the roll as, according to the magistrate, there had been an inordinate delay in the finalisation of the police investigations.

[14] On or about 7 December 2022, Mr. Kamburona was informed via telephone by Constable Salufu to attend at the magistrate court on 19 December 2022 as the matter was re-enrolled on the court roll for that date. It however transpired that the summons was served on him via WhatsApp. The law does make provision for service of summons on an accused person by means of WhatsApp. Given the fact that the summons had not been served on Mr Kamburona, according to law, the State withdrew the matter from the court's roll.

[15] On 24 January 2023, the PG again made a fresh decision to prosecute Mr. Kamburona. The summons was thereafter served on him on 9 February 2023, this time in accordance with the law. The summons, which forms part of the papers before court, commanded him to appear at the Otjinene Magistrates Court on 29 March 2023 to join his co-accused, who had already made his appearance on 19 December 2022, where after the matter was postponed to 29 March 2023 for the purpose of Mr. Kamburona to be joined as an accused person to the proceedings.

Applicant's case

[16] The applicant's case is that when the matter was struck from the court's roll on 25 November 2022, he became entitled to the release of the vehicle. He contended that the consequence of the criminal matter instituted against his brother being struck from the court's roll, meant that the criminal proceedings had fallen away, there was no longer a case pending before court. According to the applicant, consequent upon the matter being struck from the roll, he took various steps in an attempt to have the vehicle released to him but to no avail.

[17] In his replying affidavit the applicant admits that the striking of the matter from the roll did not have the effect of finality of the matter. He further states that he does not dispute that the PG has decided to prosecute his brother and his co-accused and that his brother had since been served with summons in the criminal case subsequent to the launching of the present application. He, however, asserts that 'there was no matter pending against my brother at the time of launching this application. In fact according to my advice, a person whose matter has been withdrawn is on no different footing than one who has not yet been charged.' The applicant therefore contends that the State's reliance on s 20 and 31 of the CPA to keep in custody his vehicle subsequent to the withdrawal of the charges is misplaced.

The respondent's case

[18] In opposition to the relief sought by the applicant, the PG filed the main opposing affidavit. She deposed that on 24 January 2023, she took a decision to prosecute the three accused persons namely Mr Tjavanga Kamburona, Mr Nguvarua Tjombe and Mr Martin Mbapewa. In support of this statement the PG attached a copy of her decision to her affidavit as 'OM15' stating that she has decided that the accused be arraigned on charges of- count 1: Dealing in any Controlled Wildlife, alternative to count 1: Possession of any Controlled Wildlife Product, count 2: Money laundering and alternative to count two Money Laundering.

[19] According to the PG, Mr. Kamburona was served with the summons personally on 9 February 2023, whereby he was directed to appear in court on 29 March 2023. A copy of the summons is attached as 'OM16' to her affidavit. Furthermore, by that time, Mr Nguvarua Tjombe, one of the three accused, had already appeared in court on 19 December 2022 thereafter the matter was postponed to 29 March 2023 for legal representation and for the tracing of the other accused persons.

[20] The PG further deposed that according to the law the prosecutor or the PG has no power to order the release of an article seized and held by the police to serve as exhibits in a subsequent criminal proceeding.

[21] According to the PG, the vehicle will be required at the trial proceedings as her office intends to apply for a forfeiture of the vehicle and would thus not be possible under those circumstances if the vehicle were to be returned to the applicant at this stage. It is further contended that the State is entitled to bring a forfeiture application in terms of s 35 of the CPA if the accused persons were to be found guilty of the commission of the offences they are charged with.

Issues for decision

[22] Two issues call for determination. First; whether striking of a criminal case from the court roll by the court before a plea is taken, is equivalent to a withdrawal of a case by the State in terms of section 6(a) of the CPA. Secondly; whether the striking of the applicant's brother's case from the roll has the effect on the police power to keep the article seized in terms of s 20 of the CPA in custody and to dispose such article in terms of s 31 of the CPA and thus entitles the applicant to the return of the seized article.

Applicable law

[23] Section 6(a) of the CPA, deals with the withdrawal of the charges by the prosecution. It provides as follows:

'6. An attorney-general [Prosecutor-General] or any person conducting a prosecution at the instance of the State or anybody or person conducting a prosecution under section 8, may –

(a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge...

[24] Section 20 of the CPA deals with the States power to seize articles. It provides thus:

'20 State may seize certain articles

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.'

[25] A further relevant provision of the CPA is s 30, which deals with the manner in which the seized articles may be disposed of. It provides as follows:

'30 Disposal by police official of article after seizure

A police official who seizes any article referred to in section 20 or to whom any such article is under the provisions of this Chapter delivered-

(a)

(b)

(c) shall, if the article is not disposed of or delivered under the provisions of paragraph (a) or (b), give it a distinctive identification mark and retain it in police custody or make such other arrangements with regard to the custody thereof as the circumstances may require.'

[26] Section 31 of the CPA provides for a situation where an article that has been seized but it turned out that subsequent to the seizure of an article, no criminal proceedings have been instituted or the article is not required at the trial as an exhibit or the purpose of the court making an order in relation thereto. In such an event, the section empowers the police to return such article to a person from whom it was seized

or who may lawfully possess it. Failing any person who may lawfully possess it, it would be forfeited to the State.

[27] That concludes some of the applicable laws having bearing on the adjudication of the present matter.

Discussion

[28] The consequence of criminal charges being withdrawn by the State in terms of s 6(a) was considered by the Supreme Court in *Prosecutor-General of Namibia v Namholo and Others*¹. In that matter the prosecutor applied for a postponement because the State was not ready to proceed with the case. The magistrate refused a further postponement whereupon the State ‘provisionally’ withdrew the charges. Thereafter for four years after the withdrawal the PG took no further step which prompted the accused to bring an application for the permanent stay of the proceedings contending that he was not tried within a reasonable period as contemplated by Art 12 (1)(a) of the Constitution. The application was granted. On appeal it was held that after the charges were withdrawn there were no proceedings pending and therefore there was nothing to ‘stay’. Furthermore, the person who was an accused person was no longer an accused person within the meaning of Art 12(1) (b). The appeal was upheld.

[29] The *Namholo*’s decision was applied by this court in *Tabu v Inspector-General: Namibia Police*². In that matter the plaintiff’s vehicle was seized by the police on suspicion of it being used in the commission of the offence. There was a delay by the P G to decide whether to press the charges or not. Ultimately the charges were ‘provisionally’ withdrawn however the police refused to release the vehicle to the plaintiff contending that the vehicle was part of the evidence of the case that has been withdrawn and would only be returned once the case has been finalised. That prompted

¹ *Prosecutor-General of Namibia v Namholo and Others* 2020 (3) NR 839.

² *Tabu v Inspector-General: Namibia Police* (HC-MD-CIV-ACT-OTH-2021/03011) [2023] NAHCMD 67 (17 February 2023).

the plaintiff to institute an action against the police claiming the return of his vehicle. Upholding the plaintiff's claim the court stated as follows:

'[29] This section [s 6 (a)] makes it clear that in all criminal matters where an accused person has not pleaded to the charges against him or her, those charges may be withdrawn. Such a withdrawal, however, does not result in the accused person being acquitted in respect of the said charges.

... [37] Once a matter is withdrawn in terms of s 6(a) of the CPA, there is no case before the court that the accused person is charged with. Whether the charges may be levelled against the accused person again is of no relevance, because at the time when the charges are withdrawn, whatever liability the accused stood to suffer under any limitation imposed on him or her ceases.'

[30] It is convenient to point out at the outset that s 6(a) of the CPA deals with the withdrawal of the charges by the prosecution. In the present matter the case was struck from the court roll by the presiding officer. As far as I could ascertain the CPA does not make provision for the striking of a matter from the roll by a presiding officer. It would appear to me that when a presiding officer strikes a case from the roll he or she does so in the exercise of the court's inherent power to regulate its own proceedings, for instance to prevent an abuse of its proceedings by repeated requests for postponements which result in the clogging of the court's roll and by preventing the State to abuse its coercive power against an accused person. On the other hand, when the State withdraws charges it does so in terms of s 6 of the CPA. The prosecutors acting on behalf of the State as *dominus litis* – master of the case exercising the power of the State.³

[31] In my considered view and on the authority of *Namholo* and *Tabu* the legal position is that, both the striking and the withdrawal have the same consequence. Once a matter has been withdrawn or struck from the roll the effect thereof is that there is no

³ *Thint Holdings (Southern Africa) Pty Ltd & Another v National Director of Public Prosecutions* 2009 (1) SA 141 (CC) paras [41] – [46].

longer a case pending before court. It follows that while the PG may revive or proffer other charges against an accused person the consequence of striking or withdrawal is final until the charges are revived or the accused person is recharged on similar or other charges. I move to the second question earlier identified for determination.

[32] What consequence does the striking of a case from the roll has on the State's power, exercised on its behalf by the police, to keep an article seized in terms of s 20 of the CPA, in custody and to dispose such article in terms of s 31 in the instance where no criminal proceedings are instituted or where such article is not required for criminal proceedings?

[33] In considering that question it is important to keep in mind that the facts in *Namholo* as well in *Tabu* are distinguishable from the facts in the present matter. In *Namoloh* the court did not deal with an article having been seized, but with the consequence the withdrawal of the charges had on the proceedings and resultantly on the status of an accused person that had been charged with a criminal offence. As alluded earlier in that matter the court held that following the withdrawal of the charges, the person who was previously charged, was no longer, in law an accused person within the meaning of Art 12(1)(a) of the Constitution. Put differently, in *Namholo* the court was not called upon to determine as to what was to happen to a seized article that was in custody of the police.

[34] *Tabu* followed the *Namoloh* judgment on the basis of the effect of a withdrawal of a charge by the State in that there 'exists no live case against the accused persons'. Furthermore, that there was undue delay in prosecuting the case holding that 'The defendants did nothing in the furtherance of the criminal case and cannot expect the court to come to their aid at the eleventh hour'. In that matter the court did not directly deal with the effect of ss 20 and 31 of the CPA under which the article was seized and kept in custody.

[35] In the present matter the PG agrees that the striking of the matter from the roll does not imply that the matter has been finalised as no verdict has been pronounced. The PG, however, argues that an article seized in terms of s 20 of the CPA has to be dealt with in terms of the provisions of s 30(c) of the CPA which authorizes a police officer who seized an article in terms of s 20 of the CPA to retain such article in custody or make such other arrangements with regard to the custody thereof.

[36] Mr Ludwig for the respondents referred the court to two South African judgments of *Ntoyakhe v The Minister of Safety and Security and Others* 1999 (2) SACR 349 and *Choonara v Minister of Law and Order* 1992 (1) SACR 239 (W), where the consequence or effect of the provisions of ss 20 and 31 of the CPA were considered regarding the police power to deal with the seizure and disposal of articles under their custody following the withdrawal of the charges by the State.

[37] In *Ntoyakhe v Minister of Safety and Security and Others*⁴ the applicant's goods were seized. Thereafter the charges were withdrawn. The applicant was subsequently re-charged. In his application for the release of the seized goods it was contended that the respondents did not advance any reason why the goods should not be returned irrespective of the fact that the applicant had been formally charged.

[38] In answer to the applicant's contention, the court pointed out that in the context of s 20 of the CPA which authorizes seizure of articles by the police, the word 'seize' encompasses not only the act of taking possession of an article but also the subsequent detention thereof. The court reasoned that right conferred by Chapter 2 would be rendered worthless, were it to be limited to the initial act of seizing as subsequent detention would then fall outside the ambit of s 20 of the CPA. However, the right of the police to keep the seized article is not unlimited. That right must be exercised 'in accordance with the provisions' of Chapter 2 of the CPA. One such provision is s 31(1)(a) of the Act.

⁴ *Ntoyakhe v The Minister of Safety and Security and Others* 1999 (2) SACR 349.

[39] The court further pointed out at 355 H-J, that the provisions of s 20, read with s 31 of the CPA, indicates that the main objective of the seizure authorised in Chapter 2 is to enable the police to obtain possession of articles for the purpose of investigating crimes and prosecuting suspected offenders. The Chapter 2 provisions, however, do not confer on the State the right to deprive a person of the lawful possession of an article indefinitely.⁵

[40] *The Choonara (supra)* matter concerned a vehicle which was seized by the police suspected to be stolen. The court re-affirmed the court approach in *Ntyakhe* that s 20 and s 31 of the CPA are to be read together and that both sections were aimed at facilitating the investigation and proof of some offence where the confiscated article was connected and that the State has to act with reasonable expedition in instituting criminal proceedings.

[41] I respectfully agree with the foregoing reasoning by the court in both *Ntyakhe* and *Choonara* and considered it persuasive and accordingly adopt it as a correct statement of the law applicable in this jurisdiction. In this matter it is common cause that the vehicle was never handed to court as an exhibit or for the purpose of a court order. After the case was struck from the roll by the magistrate, the vehicle remained in police custody exercising their power in terms of s 20 read with s 31(1)(a) of the CPA.

[42] It has been held that the onus rests on the applicant to prove on a balance of probabilities that no criminal proceedings have been instituted and that there is no reasonable likelihood of such proceedings in the foreseeable future.⁶

[43] The applicant in the present matter does not dispute that the PG has decided to prosecute his brother and his co-accused and that his brother had since been served with summons in the criminal case subsequent to the launching of the present application. He, however, asserts that 'there was no matter pending against my brother

⁵ See also: *Choonara v Minister of Law and Order* 1992 (1) SACR 239 (W).

⁶ *Venter v Minister van Police* (13652/2013) [2014] ZAGPPHC 64 (3 February 2014).

at the time of launching this application. In my judgment, the fact that there was no pending case when the present application was instituted does not detract from the power of the police to keep the vehicle in custody, in accordance with the provisions of Chapter 2 of the CPA given the fact that criminal proceedings to which the vehicle is connected have been re-instituted.

[44] The undisputed fact in this matter is that the criminal proceedings against the applicant's brother have been re-instated. As matters stand now, it is as good as there was no intervention in the criminal proceedings and consequently no intervention in the police power to retain the vehicle under their custody in terms of the provisions of Chapter 2 of the CPA. At the onset, the prosecution and the police have insisted that the vehicle is being kept in their custody until the finalisation of the matter as the vehicle is required for trial purposes. The conclusion I have arrived at is that the applicant has failed to discharge the onus on him.

[45] In any event, it has been held that a Superior Court should be slow to intervene in uninterminated proceedings in the court below, and should, generally speaking, confine the exercise of its powers to 'rare cases where grave injustice might otherwise result or where justice might not by other means be attained'. The applicant has not alleged that he stands to suffer great injustice should this court not interfere with the ongoing proceedings before the magistrate court.

Costs

[46] The general rule to costs is that costs follows the result. No compelling reasons have been presented to this court as why it should divert from that rule.

Order

[47] In the result I make the following order:

1. The application is dismissed with costs.
2. The matter is finalised and removed from the roll.

H ANGULA
Deputy Judge President

APPEARANCES

APPLICANT: TK Kaurivi
TK Kaurivi Legal Practitioners, Windhoek

RESPONDENTS: J Ludwig
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